IN THE HIGH COURT OF JUDICATAURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Commercial Taxes Officer, Raisinghnagar	**vs.**	M/s Raisinghnagar Co-operative Marketing Society Limited, Raisinghnagar.

S.B.Civil Sales Tax Revision Petition No.334/2001 against the judgment of the Rajasthan Tax Board, Ajmer dated 28.10.2000 passed in Appeal No.930/96/ST Srigangagar.

Date of Judgment: October 16, 2006.

PRESENT.
HON'BLE MR. PRAKASH TATIA, J.

Mr. Sangeet Lodha for the petitioner.
Mr.S.L.Jain for the non-petitioner.

REPORTABLE

BY THE COURT:

Heard learned counsel for the parties.

Following question of law is involved in this revision petition:-

> "Whether the job work conducted by the Assessee comes within the framework of works contract and whether Sales Tax can be imposed under Section 5(3) for the period prior to 19th March, 94 and consequently can the interest under Section11B be levied for the Assessment Year 1989-90?

The brief facts of the case are that the assessee was doing the job work by importing packing material from outside the State. It is alleged

that the assessee did not pay the tax in pursuance of the Notification dated 7.9.1988, by which it has been provided that in the case of works contract, the turn over of contract shall be subjected to tax. Sub-rule (2) of Rule 29 of the Rajasthan Sales Tax Rules also was incorporated vide Notification dated 24.6.1989 to give effect to sub-section (3) of Section 5 of the Rajasthan Sales Tax Act, 1954.

The said sub-section (3) of Section 5 of the Rajasthan Sales Tax Act, 1954 was declared unconstitutional and void by the Hon'ble Apex Court in the case of Gannon Dunkerley & Co. and others v. State of Rajasthan and others (1993 (88) STC 204). The date of judgment is 17.11.1992. The State Government issued another Notification, amending Section 5 of the Rajasthan Sales Tax Act, 1954 and substituted new sub-section (3) under Section 5 of the Rajasthan Sales Tax Act, 1954. The new sub-section (3) is as under:-

> "(3) In the case of works contracts, the taxable turnover of the goods (whether as goods or in some other form) involved in the execution of works shall be subject to tax in accordance with the provisions of sub-section (1)."

The said sub-section (3) under Section 5 has been made effective retrospectively from 1.4.1987 by Section 2 of the Rajasthan Sales Tax (Amendment) Act,1994, by which the new sub-section (3) was substituted under Section 5 of the Rajasthan Sales Tax Act, 1954.

In the case of the assessee-non-petitioner, the assessment order for the period commencing from 1.4.1992 to 31.3.1993 was passed on 4.1.1994,i.e. after the Notification dated 19.3.1994. The situation gives rise to position that when the sale was effected, the old sub-section (3) which was in force and, therefore, under that old sub-section (3) of Section 5 of the Act of 1954, the assessee was liable to pay the tax in time and in default and delayed payment, the assessee was liable to pay the interest over the tax amount under Section 11B(2) the Rajasthan Sales Tax Act, 1954. No tax could have been recovered from the assessee by the department after the authoritative pronouncement of the Hon'ble Apex Court by the judgment delivered in the case of Gannon Dunkerley & Co. and others(supra) till the new sub-section (3) under Section 5 was inserted by the Notification dated 19.3.1994. Meaning thereby, from 17.11.1992 to 19.3.1994, the assessee-respondent was not liable to pay even tax nor could have been charged with interest over the tax and obviously the revenue could not have demanded or recovered even the tax or the interest from the assessee in between 17.11.1992 to 19.3.1994 despite the fact that sale was effected when old sub-section (3) of Section 5 was in force and before sub-section (3) of Section 5 was declared void by the Hon'ble Supreme Court, no action was taken by the department to recover the tax or interest from the assessee. After sub-section (3) of Section 5 was

declared void, naturally the department could not have demanded the tax and there was no liability of the assessee to pay the tax so as to have any liability to pay interest in case of delay in payment of tax.

Since in the year 1994, the assessee's case was considered by the assessing authority and assessment order was passed, therefore, on the date when the assessment order was passed, new sub-section (3) under Section 5 was in force and its operation was effective retrospectively from 1.4.1987. So far as tax liability is concerned, that liability is not under challenge on any ground. The question involved is that whether the revenue can claim the interest over the tax amount which became payable by virtue of the Notification issued on 19.3.1994, making tax liability over sale, effective from back date, i.e. 1.4.1987. The Tax Board held that though the tax liability is there for the sale effected from 1.4.1990 to 31.3.1991 but the interest cannot be levied because of non-payment of the tax in time. The Tax Board was of the view that the Notification was published on 19.3.1994 amending the Section 5 by incorporating sub-section (3) under Section 5, therefore, the interest liability over tax is from 19.3.1994.

The learned counsel for the petitioner vehemently submitted that originally there was tax liability of the assessee and he was bound to deposit the tax in time. The Notification of the year 1988 was very much effective when sale was effected, therefore, it cannot be said that the

assessee was not under any obligation to pay the tax in time and in accordance with the statutory provisions of law. It is also submitted that the interest is leviable from the date when the amount becomes due by operation of law or by order. In this case , the sub-section (3) of Section 5 was declared unconstitutional by the Hon'ble Apex Court on 17.11.1992. Before that date, i.e. before 17.11.1992 the assessee was under obligation to pay the tax in time even without any regular assessment order and since he did not deposit the tax amount in time when he was under obligation to pay the tax, the assessee is liable to pay the interest over the tax amount. In view of the above, the assessing authority was right in imposing interest over the delayed payment of tax. The learned counsel for the petitioner further submits that the sub-section (3) inserted by the Notification dated 19.3.1994, has been made effective from 1.4.1987 and, therefore, the liability of the assessee is retrospective. It is submitted that once the tax liability could be made retrospective then the natural consequence of not making payment of the tax in time, should also follow.

I considered the submissions of the learned counsel for the petitioner.

It is clear from the facts mentioned above that at the time of sale, the assessee was under obligation to recover tax and pay it to the revenue. That position continued till the Hon'ble Apex Court declared

the sub-section (3) of Section 5 of the Rajasthan Sales Tax Act, 1954 unconstitutional and void. By that, a situation came into existence by which the revenue could not have demanded and recovered any amount of tax from the assessee from 17.11.1992. The revenue could have raised the demand of tax and in case of delay in deposit of tax only upto 16.11.1992 against the assessee under sub-section (3) of Section 5(old) read with Section 11B of the Act of 1954. The said tax amount also could have been recovered by the revenue after 16.11.1992, by virtue of insertion of new sub-section (3) of Section 5 of the Act of 1954 which itself came into force by its publication of Notification on 19.3.1994. Had there been no Notification on 19.3.1994, the revenue could not have recovered any tax or interest from the assessee on the strength of provision which was declared void by the Hon'ble Supreme Court. So far as making liability of payment of tax is concerned, it has been made effective retrospective for which there may be reason and validity of Section 2 of the Amendment Act of 1994 is not under challenge, therefore, before 19.3.1994 even the assessee's offer to pay the tax, could not have been accepted by the department then how he can be held liable to pay the interest over the tax amount on the ground of non-payment of tax before 19.3.1994 ? Neither there was obligation upon the assessee to pay the tax or interest nor there was any right of the revenue to recover the said amount.

When the charging section itself has been declared unconstitutional by the declaration in the judgment referred above by Hon'ble the Supreme Court, it cannot be presumed that there was any liability of the assessee to pay the tax under that provision which has been declared unconstitutional by the Hon'ble Apex Court. The interest as per sub-section (2) of Section 11B of the Act of 1954 is leviable in case where the amount of tax is demanded from the dealer as a result of the order passed in a proceeding under the Act of 1954 and such tax is not paid by the dealer within time required by or has not been paid under the provisions of the Act of 1954 then he is liable to pay the interest @ 2% per month on the amount of tax. In this situation also, the ulra-vires provision cannot be enforced by declaring that though the provision is ultra-vires and unconstitutional, still the liability came into existence under the said ultra-vires provisions of law. The liability to pay tax can be enforced under the Notification dated 19.3.1994, therefore, the payment became due only with effect from 19.3.1994 under the Act of 1954. Otherwise, it will be enforcing the unconstitutional provision if it is held that the assessee was liable to pay the tax because the old sub-section (3) of Section 5 and that cannot be allowed in view of the judgment of the Hon'ble Apex Court.

In view of the above, it is held that the tax liability is created retrospectively by the Notification dated 19.3.1994 but interest can be

from 19.3.1994 over the said tax amount under sub-section (3) of Section 5 of the Act of 1954. It is held that the Tax Board was right in holding that the interest liability of the assessee can be from 19.3.1994 and not from any earlier date.

In view of the above, I do not find any merit in the revision petition. Hence the revision petition is dismissed.

(PRAKASH TATIA),J.

mlt.